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Supreme Court of the United States

OCTOBER TERM, 1905

THE UNITED STATES, *Appellant*
vs.
THE CHEROKEE NATION } No. 346.

THE EASTERN CHEROKEES, *Appellants*
vs.
THE CHEROKEE NATION } No. 347.

THE CHEROKEE NATION, *Appellant*
vs.
THE UNITED STATES } No. 348.

IN APPEAL FROM THE COURT OF CLAIMS

BRIEF

For the Eastern and Emigrant Cherokees

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IN APPEAL FROM THE COURT OF CLAIMS

Brief for the Eastern and Emigrant Cherokees

1. *Status of Appeal.*

This appeal is from a final decree in the Court of Claims in the consolidated cases Nos. 23199—23212, and 23214 passed upon by the Court of Claims as of date May 18, 1905; the first named having been brought under the act of July 1, 1902, and Feb. 20, 1903, and the last two under the act of March 3,

1903, No. 23212, Mar. 10, 1903, and No. 23214, Mar. 14, 1903, as found on page 16 and 17 of the Indian Appropriation Bill, 2nd sess. 57th Congress, Public 144, "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites, and for other purposes." This act was intended to supercede and correct the Act of July 1, 1902, of the 1st sess. 57th Congress, Public 241, under which suit No. 23109 was brought, and in which claimant in Nos. 23212 and 23214 appear as intervenors; the latter of date Dec. 22, 1903.

2. *The Bone of Contention*

Is the second item of the award and accounting made by said James A. Slade and Joseph T. Bender, referred to in the findings and in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement; [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'School' fund	$2,125.00
"(With interest from February 27, 1819, to date of payment.)	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
"(With interest from June 12, 1838, to date of payment.)	
"Under treaty of 1866:	
"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation	432.28

"(With interest from January 1, 1874, to date of payment.)

"Under act of Congress, March 3, 1893:

"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund 20,406.25

"(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)"

Washington, D. C., April 28, 1894.

(Signed) JAS. A. SLADE.
JOS. T. BENDER.

3. *The Award*

Or finding of the Special Commission, Messrs. James A. Slade and Joseph T. Bender, or special accountants as they were called, appointed by the Secretary of the Interior under the act of March 3, 1893 (27 Stat. L. pp. 612, 643 p. 10) by which Congress appropriated $5,000 for the making of said accounting was the result of previous negotiations between the United States and the Cherokee Nation in which the United States were intent upon the purchase of the Cherokee Outlet, or Oklahoma Strip from the Indians, known as

4. *The Cherokee Agreement.*

"In making the settlement of 1851 the accounting officers of the Government charged against the Cherokee five-million-dollar trust fund the sum of $1,111,284.70 on account of removal expenses. The appropriations made by Congress July 2, 1836, of $600,000, and of June 12, 1838, of $1,047,067 were made primarily to meet the expenses of removing the Cherokees to the Indian Territory.

"The Court of Claims finds, as a matter of fact, that only $382,201.22 was paid from the amount appropriated for removals ($1,647,067) by the act of July 2, 1836, and June 12, 1838, while the greater part of the expenses of removing the Eastern Cherokees, to wit, $1,111,284.70, was, in fact, charged against the five-million-dollar trust fund. Congress, in the act

of June 12, 1838, expressly provided that no part of the sum appropriated by that act for removal should be deducted from the five millions stipulated to be paid said Indians.

"When the United States sought to purchase the Cherokee Outlet in 1891, a tract of land embracing 8,144,182.91 acres, constituting the northern part of Oklahoma, the Cherokees again renewed their contention that their $5,888,000 trust fund had been improperly charged with the expense of the removal to the Indian Territory. Accordingly, on the 19th of December, 1891, an agreement was entered into between the Cherokee Nation and the United States for the sale of the Cherokee Outlet, being the agreement referred to and described in the act of March 3, 1893 (27 Stat. L., 640, sec. 10), whereby it was provided, among other things, that—

"Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, and under any of said treaties or laws which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its National Council, such appropriation to be made by Congress,

if then in session, and if not, then at the session immediately following such accounting. (Senate Ex. Doc. 50, Fifty-second Congress, first session, 27 Stat. 643.)" (Finding IX.)

"Congress, on March 3, 1893 (27 Stat. L., 640), ratified the Cherokee agreement, and on the same day (27 Stat. L., 643) appropriated $5,000 for the employment of experts to render a complete account of moneys due the Cherokees, as required in the fourth subdivision of article 2 of said agreement. Under this provision Messrs. James A. Slade and Joseph T. Bender were appointed commissioners to render the account referred to in said agreement. The commissioners made their report, bearing date April 28, 1894, whereby, among other things, they reported that there had been improperly charged to the $5,000,000 treaty fund the sum of $1,111,284.70 on account of the amount paid for the removal of the Eastern Cherokees to the Indian Territory, and that this sum, with interest from June 12, 1838, to date of payment, was due under the fifteenth article of the treaty of 1835.

"The Court of Claims finds as a fact that the account stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and that no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust. (C. C. R.)

"On January 7, 1895, the Secretary of the Interior transmitted the account stated to the Speaker of the House of Representatives, as follows, to wit:

"DEPARTMENT OF THE INTERIOR.
"*Washington, January 7, 1895.*

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them,

into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting.

"Very respectfully,

"HOKE SMITH, *Secretary.*

"THE SPEAKER OF THE HOUSE OF REPRESENTATIVES."

5. *Suit No.* 10386 *Congressional.*

This suit No. 349 was preceded in the Court of Claims by suit No. 10386 Congressional, of that court, decided Apr. 28, 1902, entitled "The Eastern Cherokees vs. The United States," in which "The Eastern and Emigrant Cherokees" appear as intervenors, and which was brought under the Bowman Act, which only permitted the court to make "Findings of Fact," as follows:

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, May 2, 1902.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings filed by the court in the aforesaid cause, which case was referred to this court by the resolution of the Senate of the United States under the act of March 3, 1883.

I am, very respectfully, yours, etc.,

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

HON. WILLIAM P. FRYE,
President of the Senate pro tempore.

[In the Court of Claims, Congressional, No. 10386. Decided April 28, 1902. The Eastern Cherokees vs. The United States.]

STATEMENT

The claim in the above-entitled case was transmitted to the court by resolution of the United States Senate February 20, 1901, as follows:

"*Resolved*, That the bill (S. 3681) entitled 'A bill for the payment of the award of the Secretary of the Interior in favor of the Cherokees, made under the provision of the act of Con-

gress of March third, eighteen hundred and ninety-three,' now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March 3, 1883; and the said court shall proceed with the same in accordance with the provisions of such act, and report to the Senate in accordance therewith."

Senate bill 3681, referred to in the above resolution, is as follows:

"A bill providing for the payment of the award of the Secretary of the Interior in favor of the Cherokees, made under the provision of the act of March third, eighteen hundred and ninety-three.

"Whereas by the act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, six hundred and forty), the so-called Cherokee agreement was 'ratified by the Congress of the United States,' * * * and it was agreed therein that 'the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States;' and

"Whereas in said Cherokee agreement it was expressly provided that 'the United States shall without delay render to the Cherokee Nation' 'a complete account of moneys due the Cherokee Nation under any of the treaties,' and 'if it shall be found upon such accounting that any sum of money has been so withheld the amount shall be duly appropriated by Congress' 'at the session immediately following such accounting,' and

"Whereas the said act of Congress appropriated the sum of five thousand dollars (Twenty-seven Statutes, six hundred and forty-three), 'to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required by the fourth subdivision of article two of said agreement;' and

"Whereas James A. Slade and Joseph T. Bender were duly appointed by the Secretary of the Interior as experts to render the account as above authorized by Congress, and did on April twenty-eighth, eighteen hundred and ninety-four, report and render an account of certain sums due the Cherokee Nation, with interest thereon as itemized and set forth on page thirty-two, House of Representatives Executive Document Numbered One hundred and eighty-two, Fifty-third Congress, third session; and

"Whereas the Secretary of the Interior did, on January seventh, eighteen hundred and ninety-five, transmit, in compliance with the provision of the third subdivision of article two of the agreement made December nineteenth, eighteen hundred and ninety-one, with the Cherokee Indians, the above complete account of moneys due the Cherokee Nation, prepared in accordance with the provisions of the said act of March third, eighteen hundred and ninety-three, together with a certified copy of an act of the Cherokee national council accepting said accounting: Now, therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to refund to the five million dollar fund of the Eastern Cherokees the amount erroneously withdrawn therefrom on account of the removal of the Eastern Cherokees under the treaty of eighteen hundred and thirty-five to the Indian Territory, together with interest thereon, as found due by James A. Slade and Joseph T. Bender, expert accountants, acting under the direction of the Secretary of the Interior, in pursuance of the provisions of the act of Congress of March third, eighteen hundred and ninety-three, said interest to be computed at the rate of five per centum per annum from June twelfth, eighteen hundred and thirty-eight, until paid, in accordance with the resolution of the Senate of the United States of September fifth, eighteen hundred and fifty; and the Secretary of the Treasury is hereby directed to pay the principal and interest of said sum to the Eastern Cherokee Indians, per capita, in accordance with the ninth article of the treaty of eighteen hundred and forty-six."

The case was brought to a hearing on its merits on the 24th day of March, 1902. Robert L. Owen, Esq., was heard for the Eastern Cherokees residing in the Indian Territory; Mrs. Belva A. Lockwood was heard for certain individual Cherokees residing, some in the Indian Territory and some in the State of North Carolina, etc.; R. V. Belt, Esq., was heard for the Eastern Cherokees residing in the State of North Carolina and in other States east of the Mississippi, and L. T. Michener, Esq., was heard for the Cherokee Nation; and the Attorney-General, by George H. Gorman, Esq., his assistant, and under his direction, appeared for the defense and protection of the interests of the United States.

The court, upon the evidence and after considering the briefs and arguments of counsel on both sides, makes the following findings of fact: * * *

(These findings are lengthy—quite in detail, and do not differ materially from the findings presented to this court on appeal, and are set forth in full in our Findings of Fact and Brief to the court below, except as to the conclusions of law and judgment, and close as follows: after reciting the Cherokee agreement. * * *

In these Findings there was no right of appeal, and really nothing to appeal from, but they formed a necessary incident to this case.)

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:"

"Under the treaty of 1835: Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70, with interest from June 12, 1838, to date of payment."

X. The account as thus stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust.

By the Court.

Filed April 28, 1902.
A true copy.
Test this 29th day of April, 1902.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

6. *The Eastern and Emigrant Cherokees.*

The counsel for the Eastern and Emigrant Cherokees in cause No. 23,212, accepted these findings of the court, adopted them in the case 23,212, and requested the court to find further as follows:

XI. This account was transmitted to the Secretary of the Treasury, and he replies that he has "nothing to add to the (Slade and Bender) report."

XII. It was promptly presented to the Secretary of the Interior, who accepted it without demurrer or objections and January 7, 1895, was transmitted by that official to the Speaker of the House of Representatives for an appropriation, and was in course duly submitted to the Committees on Indian Affairs.

XIII. The Senate Committee on Indian Affairs, May, 1902, appointed a sub-committee composed of Senators John T. Morgan, Porter J. McCumber, and Matthew S. Quay to confer and report on Senate Bill No. 58685, second session, Fifty-seventh Congress, which had been introduced into that body for the payment of the award of the Commission. This Commission reported, p. 5: "Your Committee find that the account stated by the Interior Department, in accordance with the fourth sub-division of article 2 of the Cherokee Agreement above cited, *constitutes an award*: That it was made in pursuance of a carefully drawn contract, with the express stipulation in the face of the contract that 'if it be found on such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress.'" Again, on page 6: "Your Committee find that, under the principles laid down in the opinion of the Supreme Court of the United States, the award rendered under the contract of December 19, 1901, *must be held as conclusive.*" Their report closes, p. 8: "Your Committee therefore recommend that said bill be

passed."

XIV. That the amount thus found by the Commission, Messrs. Slade and Bender, of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment, in accordance with treaty stipulations, is due to the Eastern and Emigrant Cherokees, whose names, or those of whose ancestors are found on the Cherokee rolls of 1835-6 and 1852, about 4,000 of whom still reside in North Carolina, north Georgia, northern Alabama and eastern Tennessee, and a much larger number, to wit, about seventeen thousand persons, who have removed to the Indian Territory, some of whom form a part, and some do not, of the Cherokee Nation, so called, but all the persons enumerated herein are entitled to participate in this fund, all having Cherokee Indian blood, and the sale of whose lands in the States enumerated in 1835, constitutes the base of the interest bearing fund of $5,000,000, from which the amount claimed was improperly taken. Rolls of 1838 gives 16,211 removed and 2,202 remaining.

XV. The Court further finds that one-fourth of the whole amount claimed, with interest thereon at 5 per cent from June 12, 1838, is due to the claimants whose names are enumerated, and powers of attorney filed in the within cause, No. 23,212, in accordance with their numbers, and that judgment should be rendered to them for that amount, as required by the statute.

BELVA A. LOCKWOOD,
Counsel for Eastern and Emigrant Cherokees.

7. *Belong to the Cherokee People.*

To eliminate any surplus matter and to avoid confusion, the court will note that the claimants, the Cherokee Nation, the Eastern and Emigrant Cherokees, and the Eastern Cherokees, in the three consolidated cases, all agree that the sums set forth in the several items are due to the Cherokee people from the United States, and that the defendant does not appeal from this portion of the decree. There is no dispute between the claimants, or even with the Government about the arithmetic of the accountants, or the precise sum named in the litigation.

The former Government counsel in this case, Mr. Gorman, cited the case very tersely when he said:

"There is really no controverted question of fact presented in this case for the determination of this Court. The facts are historical in their nature. * * * Are not subject of dispute or controversy. The question presented by the record is purely one of law, to wit, whether the cost of the removal of the Eastern Cherokees to the Indian Territory is to be borne by the Cherokee Nation and deducted from the treaty fund, or whether the cost thereof is to be defrayed by the United States without charge to the Indians." This is very tersely and correctly put, and is the gist of the whole matter; and the words of the treaty are so clearly stated that it seems impossible to mistake its meaning.

Again he says: "Neither party has questioned the accuracy of this report upon any question of fact, so that if the charge for removing the Indians is to be borne by the United States, that sum is properly due to the Indians, and, otherwise, it is properly chargeable to the treaty fund." The Court of Claims has decided that the sum in controversy is due to the Cherokees.

8. *They Further Agree*

as the court will note, that the three items of the award numbers one, three, and four are conceded to belong to the Cherokee Nation without demurrer or discussion, as named by the court, or rather as we think to the Cherokee people; the court says "to the Cherokee Nation as a political or social body." This alone carries with it a judgment in the case in favor of the Cherokee Nation, and satisfies the terms of the agreement. We think that it should be the Cherokee people for whom they stood, but are not disposed to contest it, as the Cherokee Nation as it now stands has become a close corporation without even corporate powers—cannot sue or be sued,

and is on the verge of dissolution. This also conforms to the agreement, which the court below seems to have carried in its mind, and to have interpreted as meaning the whole award, as the Cherokee Nation could only stand at best with reference to the Eastern and Northern Carolina Cherokees, or for the Eastern and Emigrant Cherokees, as a naked trustee, and they have therefore, erroneously, as we think, adjudged to them the whole matter in issue in these words: "That the Cherokee Nation do have and recover of and from the United States as follows:" naming the four items of the award.

9. *The Difference in the Findings.*

The difference in the findings of the several parties in interest are for the most part more technical than material, some of them clerical, with the exceptions of vital matters discussed hereafter. The decree, based upon the opinion of the court of March 20, 1905, and of May 18, 1905, with the conclusions of law, signed and transmitted to the clerk of court for entry by Chief Justice Nott, are as follows:

10. *Conclusions of Law.*

"Upon the foregoing facts the court concludes as matters of law:

"First. That the United States is indebted to the Cherokee Nation in the following amounts, viz.:

"(1) The sum of $2,125, with interest at 5 per cent from February 27, 1819, to date of payment;

"(2) The sum of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment;

"(3) The sum of $432.28, with interest at 5 per cent from January 1, 1874, to date of payment;

"(4) The sum of $20,406.25, with interest at 5 per cent from July 1, 1893, to date of payment,

and is entitled to have judgment entered in its favor against the United States therefor.

"Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the

Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

"(a) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer of the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

"(*b*) The amount represented by item numbered one (1), for $2,125 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the 'Cherokee school fund,' of which fund the United States are trustees;

"(*c*) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the 'Cherokee national fund,' of which fund the United States are trustees;

"(*d*) The amount represented by item numbered two (2) for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, *as individuals*, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior."

(If the court means in clause "d" only those Cherokees who were parties to the Treaty of 1836 and 1846, then we agree with it.)

"Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. I, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appro-

priation by Congress for the payment of the judgment in this cause.

"Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the balance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom."

11. *Court of Claims.*

(Record, page 112.)

No. 23199.

THE CHEROKEE NATION v. THE UNITED STATES.

No. 23214.

THE EASTERN CHEROKEES v. THE UNITED STATES AND THE CHEROKEE NATION.

No. 23212.

THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES.

JUDGMENT ENTERED MAY 18, 1905.

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of $2,125.00

With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

Item 2. The sum of 1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3. The sum of 432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

Item 4. The sum of 20,406.25
With interest thereon from July 1, 1903, to date of payment.

The proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125 with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28 with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1828, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree, shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

12. *United States Objects.*

From this final decree the United States, represented by Hon. Lewis A. Pradt, has appealed, as was expected, because the special acts sending these cases to the court pre-supposed an appeal, and Congress does not wish to appropriate money for this large amount without a decree from this Honorable Court.

Because it is the custom of the counsel for the Government to oppose the payment of money by its officers, especially in large sums, and he is paid to rack his mentality for objections to such payments, even if far fetched, as they have been in this case, referring mostly to the status of the expert accounts, Messrs. Slade and Bender, for having injudiciously arrived at the conclusion that the United States Government was indebt-

ed (as they state it) to "amount paid for removal of *Eastern Cherokees* to the Indian Territory," improperly charged to the treaty fund of $1,111,284.70, with interest thereon at 5 per cent per annum from June 12, 1838, to date of payment," due under the 15th article of the Treaty of 1835; which is the contention in this case. The counsel for the Government further objects, as do we, to the payment of any portion of the sum mentioned in the second item of the award to the Western Cherokees or Old Settlers, otherwise known as the Cherokee Nation, for the reason that their proportion of this fund from which the money was improperly taken, viz.: "one-third part of said residuum" was paid to them and distributed per capita in accordance with Art. 4 of the Sixth Treaty of Washington, as allowed Sept. 30, 1850, and their receipts, as a full discharge of the Government's obligation to them on this account was given therefor, and is on file in the Treasury Department.

13. *The Eastern Cherokees Object.*

From this decision the Eastern Cherokees, represented by Messrs. Owen and Belt, have appealed—objecting to any payment being made to the Western Cherokees alias the Cherokee Nation out of Item 2, for the reason stated above, that they, the Western Cherokees, have already had their share, and are not entitled to participate in this fund, that the indebtedness is one especially due to the Eastern Cherokees as represented by the treaty of 1835-6-8 and of 1846, and that the Cherokee Nation as a body politic or a corporation are now practically defunct, are not entitled either equitably or legally to receive or distribute any portion of this fund, a fact well understood by the rank and file of the Cherokee people, although the principal chief and his advisers at a very late day were constrained to ask for it, and to file their suit herein. Notwithstanding that their agreement with the Government was uncompleted, they not only did not bring suit but they did not assist in the legis-

lation which sent this Congressional claim to the Court of Claims for Findings of Facts, or later sent it back for a judgment, or take any serious interest in the matter until the court had made its findings, sent them to Congress for an appropriation, and Congress had enacted new legislation, sending the case back to the court for final adjudication; and after notification by the Secretary of the Interior, the case having been abandoned by their former attorneys, when the Nation, so called, appears by counsel and claims the whole fund.

14. Counsel for the Eastern and Emigrant Cherokees sustains the Eastern Cherokees in their contention against the United States and as against the Cherokee Nation, and as to the reasons therefor; and their cause and that of the Eastern and Emigrant Cherokees in this regard is virtually one except for the specific proportions of the money claimed, and as to the individuals who are to receive it; the Eastern Cherokees Claiming the whole amount and the Eastern and Emigrant Cherokees claiming only one-fourth of item two of the award, or their pro rata according to their number.

15. *The Eastern and Emigrant Cherokees*

Stand in the same position as the Eastern Cherokees with reference to the status of this fund and its payment, believing that it should be paid entirely to the Eastern and Emigrant Cherokees as individuals per capita as provided by the treaties of 1835-6 and 46, whose lands in North C...olina, orth Georgia, Northern Alabama and Eastern Tennessee, all formerly the Province of North Carolina, were sold to create the Five Million Fund—an interest bearing fund in the hands of the Government, from which the $1,111,284.70 was, as the expert accountants state, "improperly taken."

They believe that the appeal of the government, with the fair mindedness and clear sightedness of this court, when the

facts are fully before them, will do them justice. They were not paid their two thirds of this fund as agreed by the Treaty of 1835, when the old settlers, or Western Cherokees received their one third, which was distributed pro rata. See Opinion of the Court.

16. *The Oklahoma Strip or Outlet West.*

The Eastern and Emigrant Cherokees here represented, received no portion of the eight million five hundred thousand ($8,500,000) dollars, paid to the Cherokee Nation, for the Oklahoma Strip or Outlet West, ceded to the Cherokee people, and their descendants forever; nor have they for the most part been able to receive allotments of the lands in the Indian Territory which is being distributed in severalty to the members of the Cherokee Nation or socalled 'citizens' for the reason that they did not remove West soon enough, or have gone outside of the Territory to make their living—some of them to teach or to preach, and some to go into trades, or to cultivate the soil; and all of them poor—mostly without lands, with moderate means, striving to eke out an existence, and to become worthy citizens of the United States, and to whom their small pro rata of this award would be a partial compensation for their entire loss of land in the Indian Territory, their attempts at thrift working against them by the Act of the National Council.

17. *What are the facts?*

There is no longer any Cherokee Nation. Congress on the 3rd of March, 1901, and before the filing of this suit, wiped out the Cherokee Nation and all of the tribal relations of the five civilized tribes of Indians in the Indian Territory by determining that it should go into liquidation Mar. 4, 1906. The Cherokees themselves, by act of their National Council, voted to abolish their tribal relations Mar. 30, 1906.

Public No. 173.

"An act to amend Section 6, Chapter 119, *United States Statutes-at-Large*, No. 24, p. 390: Be it enacted by the Senate and House of Representatives, U. S. A. etc.,

"That Section 6, of Chapter 119 of the United States Statutes-at- Large, No. 24, page 390, is hereby amended as follows, to wit: After the words 'civilized life,' in line 13 of said Section 6, insert the words 'and every Indian in Indian Territory.' Approved March 3, 1901."

Section 6, Chapter 119, U. S. S. No. 24, page 390, February 8, 1887, to which these amendments apply, reads: "That upon the completion of said allottees, each and every member of the respective bands or tribes to whom allotments have been made, shall have the benefit of, and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without, in any manner impairing, or otherwise affecting the right of any such Indian to tribal or other property."

Thus it will be seen that Section 2,103 of the United States Revised Statutes, p. 37, with reference to contracts with Indians, is repealed by implication, and any civilized Indian or

Indians, may contract, sue, or be sued, the same as any white citizen.

But the indebtedness sued for here is based upon the treaty of 1835. That treaty was modified by "The Sixth Treaty of Washington," proclaimed Aug. 17, 1846. The last half of Article 7, of this treaty, pages 104-5, T. B., states: "All the investments and expenditures which are properly chargeable upon the sums granted in the Treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are particularly enumerated in the 15th Article of the Treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum, or amount which would, under such marshaling of accounts, be left for per capita distribution among the Cherokees emigrating under the Treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to *one-third* (1-3) *part of said residuum* to be distributed per capita to each individual of said party of "Old Settlers," or "Western Cherokees. (Paid Sept. 30, 1850.) That the principal above defined shall embrace all of those Cherokees west of the Mississippi River who emigrated prior to the Treaty of 1835." Here we have nothing to be distributed to the Western Nation, so called, or the people who formerly composed it, calling themselves now the Cherokee Nation in distinction from the Eastern and Emigrant Cherokees. This amount is also found by counsel for the Government in his original brief p. 9.

18. *Why In This Appeal?*

a. The Eastern and Emigrant Cherokees are in this Appeal, first, by reason of their independent suit, No. 23,212, brought in the Court below, not as a Nation or a Band, but as individuals or families by their individual or family powers of attorney duly executed, with a history of their Cherokee origin, and numbering about 6,000 persons, the scale ascending as the

parties have petitioned to come in, having numbered in the first suit only about two thousand persons.

b. They are in this Appeal because the United States in its Appeal and contention on the only point at issue—the manner of payment of item 2, have brought them here.

c. They are in this Appeal because of their Intervention in Suit No. 23,199 of the Court below, in which they claimed their one-fourth share of the fund included in item 2, and "The Nation," with consummate modesty, claimed the whole award, while they only number about one-third of the Cherokee people.

d. They are in this suit because their contention and claim is embodied in Suit No. 23,214, in which they, the Eastern Cherokees, claim the whole of item two with the interest thereon, and they have Intervened in Suit No. 23,212 whose members only claim their one-fourth, or pro rata share, according to their numbers; and because all of these suits by motion of the Eastern and Emigrant Cherokees, and by motion of the United States as embodying the same subject matter, were by order of the Court below consolidated and heard together as one suit; and the decision in that consolidated suit is the Decree here appealed from,—or only that portion embodied in item two, and not on account of the amount involved for that is an agreed fact, but to whom shall it be paid? The Eastern and Emigrant Cherokees ask for one-fourth of Item Two to be distributed to them as individuals or as families.

19. *The Cherokee Nation Objects.*

The Cherokee Nation, represented by its counsel, Edgar Smith, Frederic D. McKenney, and others, having received the judgment of the Court in their favor as far as it was possible in all conscience for the court to make it, now "want the earth" as well as the money, and appeal from the decision of the Court below, because it does not allow them to distribute the money contemplated in item two, instead of the Secretary of the In-

terior, who is the proper custodian of this fund, and in face of the fact that the law forbids them to distribute it, or any other Indian funds.

20. The Cherokee Nation could not receive this money for distribution under any equitable decision of the Court, nor in any capacity except as trustee of the fund; and it stands in no sense in the relation of Trustee to the Cherokees in North Carolina, Georgia, Alabama and Tennessee, or in Missouri and Arkansas, nor could the terms of the treaty be fulfilled in that way, and the United States be discharged of its obligation. The Treaty of 1835-6 upon which the money in item two is based read as follows:

Art. 9. "The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of the 29th of December, 1835, which said settlement shall exhibit all money properly expended under said Treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal and subsistence, and commutation therefor, debts, and claims upon the Cherokee nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty, to be invested as the general fund of the nation; and all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, *heads of families, or their legal representatives*, entitled to receive the same under the Treaty of 1825, and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto."

Art. 10. "It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States East of the Mississippi River had, or may have had, under the treaty of 1835, or the supplement thereto."

21. It will be seen by the above articles that this money when paid must, in order to comply with the Treaty of 1835, be paid either per stirpes or per capita, and so Mr. Gorman, the government counsel, declared in his first brief, but per capita we hope.

The second item of the report, belongs exclusively to the Eastern and Emigrant Cherokees, and as tersely told in that report, this amount was "improperly charged to the Treaty Fund," said Treaty Fund being an interest bearing Fund held by the United States as trustee for the Eastern and Emigrant Cherokees, and created by the sale of Cherokee lands in North Carolina, North Georgia, Northern Alabama and Eastern Tennessee, said lands belonging to those individual Cherokees, whose names, or those of whose ancestors appear on the census roll of 1835, and 1836, some of whom still remain in those sections of the country,—many on reservations, and a larger number who have gone West, to the Indian Territory, but whose names are enumerated herein, identity given, and genealogy proven.

22. *The Cherokee Nation*

Has no longer any existence except in name. It has been emasculated of all power; cannot establish courts or make laws for its people, and though claiming this fund, by virtue of the agreement is forbidden by statute from receiving it.

The Act of June 28, 1898, (Curtis Act,) reads, Sec. 19 (30 U. S., Stat. p. 495):—

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or any officer thereof, for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior, by an officer appointed by him; and, per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previous-

ly contracted obligation."

So it will be seen that the Nation, so-called, cannot receive and disburse this money even as trustee, and is neither equitably or legally entitled to receive it.

23. Opinion of the Court (Ninth page).

We cannot do better here than to quote the opinion of the Court below, who after the most careful and painstaking research, and hearing of lengthy arguments, has delivered among other things the following:—

"The present case is also complicated by the fact that a considerable portion of these communal owners are neither citizens of the Cherokee Nation nor subject to its jurisdiction nor dwellers within its territory, but are and always have been residents of territory east of the Mississippi, owing allegiance now exclusively to the United States. It is also complicated by the fact that the account rendered by the United States to the Cherokee Nation is made up of four distinct and essentially different items: One, the chief one, is for money erroneously charged to the Cherokees instead of being divided *per capita* among them; another is for money which should have been added to the principal of the school fund, a fund which is held by the United States in trust; a third is for money improperly charged to the Cherokee national fund, likewise held in trust by the United States. Only one appears to be money properly due to the Cherokee Nation as a government, and that for the inconsiderable amount of $432.28. The case is further complicated by the fact that the government of the Cherokee Nation is passing away; that it has already ceased to possess a judiciary, and that on the 4th of March, 1906, it will, to all intents and purposes, expire.

"The action instituted in this court by the Cherokee Nation was properly an action at law to recover a liquidated amount of money upon an express contract. But the act of 1st July, 1902 (32 Stat. L., p. 716, 68), under which it was instituted, authorized the court to adjudicate any claim which the Cherokee Nation "or any band thereof" might have against the United States, with "full authority by proper orders and

process to make parties to any such suit *all persons whose presence in the litigation it may deem necessary or proper* to the final determination of the matter in controversy" The supplemental act 3rd March, 1903 (32 Stat. L., p. 996), expressly authorized "the Eastern Cherokees, so-called, including those in the Cherokee Nation and those who remained east of the Mississippi River," to come in and prosecute their claims, with power to the court "also to determine as between the different claimants, to whom the judgment so rendered equitably belongs." The case, then, being that of many persons severally interested in a common fund, is one of which equity takes jurisdiction; and the several suits merged by interpleader into one have become a suit in equity.

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf but allowing them to receive the consideration per capita. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the Treaty of 1835, were equally interested, with the communal owners who were carried to the west, in the $5,000,000 fund which was the consideration of the

cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the Outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the nonfulfillment of the Treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the money would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners. A great change has come within a few years both as to the powers and the responsibilities of the Cherokee Nation. Its statute went to the full extent of the civil law in making the Government liable to all persons being citizens of the nation: "The Cherokee Nation shall be liable to all persons whatever, citizens of the nation, having claims at law or equity against her, to the same extent as individual persons are liable to each other, and may be sued by any citizen having a cause of action." (Code 1874, p. 240, Sec. 130.)

"But the judiciary has ceased to exist, and, as has before been said, the nation itself as a government will cease to exist. "The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people, some of whom were still in the savage state and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits, and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the Territory—a condition which was to continue until the two branches of the nation should be united under the Treaty of 1846 (27 C. Cls. R., 1); yet for

more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights." (*Journeycake* v. *Cherokee Nation*, 28 C. Cls. R., 281, 317.)

"Since those words were written a hopeless development has taken place in the affairs of this people. It has been with them as it has been with other nations—as it has been with families and individuals—to rise in the times of their tribulation, but to sink under the enervating blessings of prosperity."

24.

This should not be deplored by any party, as it is for the betterment of the Indians, and a complete evolution from their former condition. After the lapse of more than four hundred years, this unassimilative people are to take their places as citizens of this great Republic. The Court says further: —

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be intrusted with the receipt and distribution of the moneys belonging to other persons.

"The persons to whom distribution of this fund of $1,111,284.70 with accrued interest would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the western and the eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows, necessarily, that each and all of the present owners, whether on the east or

the west of the Mississippi, and whether the descendants of eastern or western Cherokees, have the same individual interest in the fund and will be entitled to like amount per capita."

25. Take Issue With the Court.

It is at this point that we take issue with the court below. The reasoning is good as to communal ownership, the treaty of 1846, etc., and was undoubtedly true and fair at the date of the treaty and up to the time when the Western Cherokees received their pro rata of the fund, and gave their receipts therefor. We cannot now see, after this payment to the Western Cherokees, or Old Settlers, and after they have kept all of the western lands and proceeds of sale of the Oklahoma Strip for their own use and benefit, that either the Nation, the Western Cherokees, or their attorneys should participate in the balance of this last distribution of communal property belonging to the Eastern and Emigrant Cherokees, as their share.

26.

If, as the court states, the Nation as such, has not status enough, to be intrusted with the distribution of this money, why should their attorneys be permitted to collect the per cent. which the counsel for the Eastern Cherokees have so honestly earned in this cause by securing the legislation of the two special acts, and other matters that have sent this claim to the court for adjudication, through which they have carried it, and have finally brought it here on appeal, and thus deprive them of their fee, or compel the Cherokees to pay a double fee out of the small stipend that will form their pro rata, simply because the Cherokees asked and the United States agreed that all unsettled accounts between the Government and the Cherokees under any of the treaties enumerated should be adjusted, and that if it was found that the Government owed them anything it should be promptly paid.

27. The Liability of the Government to Pay the Award.

I feel obliged to use this term because to me, notwithstanding the protest of the Government counsel, and the words of the court, it does not mean anything else, and was "made in accordance with the provisions and the requirements of the submission."

The Attorney-General says with regard to the Slade-Bender Report, that it is the work of mere clerks—that they were without legal authority, or legal ability to draw any conclusions about this matter, although they were selected by the Secretary of the Interior under the authority of an Act of Congress, not only on account of their ability as expert accountants, but on account of their knowledge of Cherokee Indian affairs, and because they were dealing exclusively with such matters. He denies that it is an award but reluctantly admits that it may be an account stated. That Slade and Bender, if they could do nothing else could make up a correct account. We believe it to be an award as binding as the judgment of a court; and as a part payment for the Oklahoma Strip embodied in the so-called "agreement," which the Government ratified by paying over to the Cherokee Nation the $8,500,000, promised at the same time, and the taking possession of the Oklahoma Strip; thus pledging the faith of the United States to complete the whole agreement, and abide by the decision of the referees.

Justice Weldon in commenting on this aspect of the case states: (See opinion of the Court.)

"The consideration therefore consist of different elements of inducements, and in law those elements constitute and form the basis upon which the agreement rests, and none can be eliminated without the destruction of the entire force of the agreement.

"The consideration though in parts and sections is a unit, and to disturb or eliminate one element is to destroy the whole. The consideration is the basis of the contract, and without its

preservation as a whole the contract fails.

"The court must therefore assume that without all of the considerations the Cherokee Nation would not have released to the United States a district of country large enough to be one of the States of the Union."

No person has questioned the accuracy of the accounting. The Cherokee Nation accepted it on behalf of the Cherokee people; the Secretary of the Interior accepted it on behalf of the Government (see letter of Hoke Smith, Jan. 7, 1895) and again on the call of the Eastern and Emigrant Cherokees No. 23,212, in the Court of Claims, May 15, 1905, states:

28. Report of Secretary of Interior.

Permit me to report:

"An examination of the records of this office has been made as to whether they contained any documents or letters which would throw any additional light on the questions involved in the suit above in the Court of Claims, and it has been ascertained that the records of this office have been thoroughly searched heretofore, and all matters of record or otherwise, in this office which would in any wise tend to support the contention of either party have already been incorporated in the official reports which have hitherto been published by Messrs Slade and Bender which culminated in their well known report, every letter and document in this office were carefully scrutinized, and were partially the basis of that report.* * * There appears to be nothing left except questions of law which are peculiarly in the province of the Treasury Department.

29.

Statement. TREASURY DEPARTMENT.
Office of Auditor for the Interior Department.
Washington, D. C., March 19, 1903.

The Comptroller of the Treasury.

SIR: I return herewith the request of the Hon. L. A. Pradt,

Assistant Attorney-General, for information in the case of the Cherokee Nation *vs.* The United States, in the Court of Claims, No. 23,199, referred to this Office March 18, 1903, for report, with the following information:

The Act of March 3, 1893 (27 Stat. 643) appropriated $5,000 to enable the Commissioner of Indian Affairs under the direction of the Secretary of the Interior, to employ expert persons to render a complete account of moneys due the Cherokee Nation. Said account was rendered by Messrs. Jas. A. Slade and Joseph T. Bender, April 28, 1894, and was transmitted to the Speaker of the House of Representatives by the Secretary of the Interior, Jan. 7, 1895. See Ex. Doc. 182, 53rd Cong. 3rd sess.

It is believed that said account embodies all of the information touching the above entitled cause, that can be obtained from the files of this office. Respectfully,

(Signed) R. A. PERSON,
Auditor.

The United States had the money, the books, and the vouchers, and employed their own accountants, who on April 12, 1894, declared that the United States had improperly taken from the Five Million Fund, an interest bearing fund in the hands of the Government, $1,111,284.70, and that this amount was due to them, together with interest at 5 per cent. per annum from June 12, 1838 to date of payment. The Court of Claims repeated this in its Findings May 2, 1902, and rendered a Judgment for that amount on May 18, 1905.

30. *Liability for the Interest.*

This is a case in which the principal and interest seem to be inseparably connected, because it is provided for in the Treaties of 1835-6 and 1846. See also report of Senate Committee.

"The treaty of 1846 expressly pledged to the Cherokees a fair and just settlement of the moneys due them under the treaty of 1835, and that only sums properly chargeable against them should be entered as a charge against the trust fund.

Notwithstanding this agreement to make a fair and just settlement which was obligatory upon the United States, independently of the treaty of 1846, the accounting officers of the Treasury did in fact take from the $5,000,000 trust fund, for the expenses of removal, the sum of $1,111,284.70. This sum should have been found due to the Cherokees when the settlement was made with them in 1851, and should have been paid to them with interest at 5 per cent. per annum from June 12, 1838, until paid.

"Interest was found due the Cherokees on this sum by the Interior Department in its award of April 28, 1894, for the following reasons: First, that this fund was taken from the trust fund, which, under the general statute, bore interest at 5 per cent.; second, because by the eleventh article of the treaty of 1846 the United States agreed to leave the question of interest to the decision of the United States Senate, and the Senate of the United States, on the 5th of September, 1850, acting as umpire, passed the following resolution:

"*Resolved*, That it is the sense of the Senate that interest at the rate of 5 per centum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid."

"Congress ratified this decision of the Senate of the United States in various acts, to wit.: On September 30, 1850, in making settlement with the Eastern Cherokees on that date (9 Stat. L., 556); on September 30, 1850, in an appropriation to the Western Cherokees (9 Stat. L., 556); on February 27, 1851, in an appropriation to the Eastern Cherokees (9 Stat. L., 572); on February 27, 1851, in making the appropriation to the Western Cherokees (9 Stat L., 572); on August 24, 1894, in making the appropriation to the Western Cherokees (28 Stat. L., 451); on March 3, 1809, in making the appropriation to the Western Cherokees (30 Stat. L., 1235). The Supreme Court of the United States had occasion to pass upon the scope of the

Senate resolution of September 5, 1850, in regard to interest, in the case of the Western Cherokees against the United States. The court said:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed, at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid."

The Attorney-General, in dealing with matters of interest in this case, states as follows in part:

31. *The Attorney-General.*

"The claim for interest in this action, which amounts to about three and one-third times the principal, or the sum of $3,700,000, in round numbers, is based upon the authority of the *United States* v. *Old Settlers*, 148 U. S., 427. The decision relied upon is based upon the resolution of the United States Senate as umpire, adopted September 5, 1850, deciding that interest should be allowed at the rate of 5 per cent per annum on the sums found due the Eastern and the Western Cherokees, respectively, from June 12, 1838, until paid. This resolution was made pursuant to Article II of the Treaty of 1846, which provided for leaving to the Senate "the question whether the Cherokees shall be allowed interest on whatever sum may be found due the Nation and from what date and at what rate per annum." The method of ascertaining the sum due the Nation thus referred to is prescribed in section 9 of the same treaty, wherein the United States "agree to make a fair and just settlement of all moneys due to the Cherokees." * * *

"And thereupon, having determined the actual amount due the Western Cherokees which should have been found in the accounting under consideration, the court went on to say, on the question of interest: ••

"But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect. * * *

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling." (Page 478.) * * *

From this point the Attorney-General dissents.

32. Parties Agreed.

The United States has not appealed from the amount of the Findings of the court.

But so far as appears the United States has not appealed from the judgment of the court in either the amount of the principal or the interest, so that an elaborate discussion on that ground is not necessary. We are agreed that $1,111,274.70 is due to the Cherokees with interest from June 12, 1838, or the time when the five million fund was depleted.

The Eastern Cherokees and the Eastern and Emigrant Cherokees, and the United States are agreed that this fund shall be paid in accordance with the 9th article of the Sixth Treaty of Washington or the Treaty of August 17, 1846, the latter portion of which reads as follows:

"The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the Treaty of 1835,

and the supplement thereto."

33.

"Art. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees, now residing in States east of the Mississippi River had, or may have, under the Treaty of 1835, or the supplement thereto."

"Art. 12, Treaty of 1835. Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirious to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita, as soon as an appropriation is made for this treaty.

34.

"Such heads of Cherokee families as are desirious *to reside* within the States of North Carolina, Tennessee, and Alabama, subject to the laws of the same, and who are qualificd or calculated to become useful citizens, shall be entitled on the certificate of the commissioners to a pre-emption right to one-quarter section at the minimum Congress price, etc., etc." The Cherokees were not allowed at that time to pre-empt lands in Georgia, whose State Government and individual citizens had been very influential in driving the Cherokees out of the State, from whom, by the Treaty of New Echota they had received a large tract of valuable land, located in north Georgia. Notwithstanding this, there are still many Cherokees and their descendants in north Georgia, as we shall show.

35. *Cannot be Relieved from its Obligation.*

Justice Nott in his opinion says:

"When the account was thus received by the Cherokee Nation (May 21, 1894) the 'twelve months' of the agreement, within which the Nation must consider it and enter suit against the other party in the Court of Claims, began to run; and with the Nation's acceptance of the account (December 1, 1894), the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another; and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

It would therefore seem that the United States cannot be either legally or equitably relieved from its obligation to the Cherokee people unless this fund is distributed individually and per capita to the families or persons entitled to receive it, whether in North Carolina, Georgia, Alabama, or Tennessee; or in Missouri, Arkansas, or the Indian Territory, or elsewhere, the same being those persons who have not yet received their per capita. This idea was also suggested by Mr. Gorman, attorney for the United States, in his first Brief to the Court of Claims. To carry out this idea the court below bery properly

suggests that new rolls be made as follows: p. 12, of Opinion of the Court, March 20, 1905:

"That the amount of $1,111,284.70, together with interest thereon from June 12, 1838, to a day when the Secretary of the Interior shall be ready to make payments, as hereinafter provided, nevertheless be paid directly to communal owners being Cherokees by blood, whether on the eastern or western side of the Mississippi River. And to that end the Secretary of the Interior is authorized to appoint one or more commissioners to proceed to the Cherokee country and to the country of the Cherokees residing east of the Mississippi to ascertain and report to the Secretary the facts necessary for the formation of rolls of all Cherokees by blood, the expenses of making out and preparing such rolls to be a charge upon and paid out of the fund awarded by the decree.

"The decree will also provide for the payment of the fund to the parties per capita, the charge of distribution likewise to be a charge upon the fund."

37. *Who are the Eastern and Emigrant Cherokees.*

At the date of the Treaty of 1835-6~~2~~, 1846 when the subject matter of this suit originated the Cherokees East were the Nation, and were long known as the Eastern Cherokee Nation.

At the date of the Treaty of New Echota, Dec. 29, 1835, several thousand Cherokees had already removed to what is now known as the Indian Territory. To distinguish them from the Cherokees who remained in the Eastern States they were commonly called the Western Cherokees. After the removal of the Cherokee Nation to the Indian Territory, this name was no longer distinctive, and those Cherokees who had been known as Western Cherokees were thereafter known as "Old Settlers."

The Cherokees who removed to the Indian Territory after the signing of the Treaty of Dec. 29, 1835, as well as those who remained permanently east of the Mississippi, were thereafter

known as Eastern Cherokees, and the descendants of the latter who removed, as Eastern or Emigrant Cherokees, or as forming one body with those who remained east.

38. *The Number.*

Of the last named who form the third division of this tripartate suit ~~No. 189,~~ there are now 6,000 Cherokees whose family powers of attorney, ages, and genealogy are filed in this suit, and who claim to represent fully one-fourth of that portion of the Cherokee people known as Eastern Cherokees, and among whom the fund in dispute in this cause should be divided pro rata. The special legislation by which these cases were permitted to be brought in the Court of Claims was secured by the Eastern Cherokees. It is their suit.

Peele, J., in the Opinion of the Court below, of March 20, 1905, p. 27, states as follows:

"Under the amended section the Eastern Cherokees appeared by counsel and filed their petition, claiming that they were entitled to the amount stated in the account so rendered under the direction of the Secretary of the Interior for the cost of their removal to the Indian Territory, with interest thereon at 5 per centum from June 12, 1838. Still another class, known as Eastern and Emigrant Cherokees, appeared by counsel and filed their petition, in which they claimed one-fourth of the amount stated as the cost of removal of the Eastern Cherokees to the Indian Territory. Therefore, the Cherokee Nation, as well as the Eastern and all other Cherokees claiming any interest in the subject-matter of the litigation, appear to be in court as required by the jurisdictional act."

39. *To Whom the Item No. 2 of the Award Belongs.*

As stated, it belongs exclusively to the Eastern and to the Eastern and Emigrant Cherokees. The Five Million Fund

from which the item of $1,111,284.70 was taken was created by the sale of the lands of the Eastern Cherokees in North Carolina, Georgia, Alabama, and eastern Tennessee. It was made a trust fund, an interest bearing fund at 5 per cent per annum in the hands of the Government. The treaty states who these people are. They are those Cherokees whose names or those of whose ancestors are on the roll of 1835-6-8, or the Treaty of 1846, "the Cherokee Nation East according to the census just completed, and such Cherokees as have moved west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees East."

40. *Do Not Wish it Paid to the Cherokee Nation.*

It is the very urgent desire of the Eastern and Emigrant Cherokees that this money be not paid to the Cherokee Nation, even as a trustee, for other reasons than those named by the court; for in that event, not a dollar of it would be paid to the Cherokees in North Carolina, north Georgia, northern Alabama and eastern Tennessee, nor in Missouri and Arkansas, nor to a large number of Eastern Cherokees in the Indian Territory, of undoubted Cherokee blood who have not been enrolled by the Commission of the Five Civilized Tribes, and admitted to citizenship, although their applications have been duly filed for enrollment, are of Cherokee blood, and proofs furnished, on account of objections filed by the principal Chief and his subordinates, or some arbitrary provision of the council who have found that these persons did not remove to the Territory in due time, or have not permanently abided there, or have found occupation outside of the Territory, and in this way many families have been divided by some of them securing enrollment, while other members have been denied it.

41.

In the distribution of the $8,500,000 for the sale of the Outlet, or Oklahoma strip, the Eastern and Emigrant Cherokees received nothing. In the distribution of the tribal land in the Indian Territory, the Eastern and Emigrant Cherokees whom I represent, as a rule will receive nothing, because they are not on the enrollment. In the distribution of the money from former sales of Western lands they received nothing, although a suit was brought by the Eastern or North Carolina Cherokees in the Court of Claims vs. the Cherokee Nation of Indians in March 7, 1883, known as No. 13,606, to recover their share in which the court decided that they could not recover because they had not removed west, and taken up their homes with the Nation, and therefore had no common rights, but even that procedure has failed to give them citizenship since it became known that the lands in the Indian Territory were to be distributed.

42

But this fund belongs to them, exclusively as we think, by all the laws of descent known to our jurisprudence. They are individual citizens of this great Republic, who have adopted in the words of the law, "the habits of civilized life, and are entitled to all of the rights, privileges, and immunities of citizenship; without affecting their right to tribal property." See Act of March 1, 1901.

43.

Justice Nott, who listened with infinite patience and interest to all of the manifold details of the various branches of this case, was right in calling it a suit in *Equity* (and in this he was seconded by Justices Weldon and Peele), and, by including all of the parties in interest in this decree, which must be forever memorable, whatever may be the action of this court.

44. *Eastern and Emigrant Cherokees Poor.*

The Eastern and Emigrant Cherokees are poor, the large majority of them are without land. About 2,000 of them are located on what is known as the Qualla Boundary in the northwest portion of North Carolina, where they have a communal interest, which is now in the hands of, and controlled by a corporation, by a deed from the Government. If any Cherokee moves off from this reservation and ventures to return, he is called a trespasser. A number of such trespassers have appealed to me to protect their interest, but they have no redress except to be recognized by the corporation.

The distribution of this one-fourth interest pro rata by the Secretary of the Interior into these poor homes will carry light, hope and comfort to many a cheerless hearthstone. They are a frugal and industrious people.

45. *The People of the Western Nation*

are rich. Their fathers, mothers and every child born before September, 1902, have their allotment of land. They had their share of the "Strip" money. They will participate in the tribal funds still in the hands of the Government. Why should they take this sum out of our hands for distribution by the Nation simply because the so-called agreement was made with the Nation? It had to be made with somebody. The Government wanted the land, and it had to get hold of somebody who had a corporate existence and a legal entity to make the transfer, and it took the so-called Cherokee Nation and we must abide by it. It is probably the last claim which the Eastern and Emigrant Cherokees will have against the United States.

46. *Have Abolished the Nation.*

Having wiped out the Cherokee Strip that had been given to the Cherokees as a perpetual outlet to the sea, which was to en-

dure to the end of time, Congress proceeded to wipe out the Cherokee Nation, and has from time to time, and from year to year limited its duties—emasculated it—giving to the Indians increased individual powers, until the Commission of the Five Civilized Tribes announced that it would complete the allotments by June 30, 1905. I do not think that it has yet been fully completed, but whenever this is done, the supervisory duties of the so-called Nation will expire. They have themselves in National Council assembled agreed to a dissolution of their tribal powers on March 4, 1906. That time will arrive before the new rolls are made, and the money contemplated in this suit will be paid. We have not for obvious reasons, chosen the Cherokee Nation as our trustee, but we do not object to the Secretary of the Interior.

47. *The Parties Claiming.*

As to the parties claiming in Suit No. 347, the Eastern Cherokees, we have no controversy. We are working practically for the same end, and pretty much the same way, but we do not wish the court to appropriate to them the entire fund, contained in Item 2 of the award, or to control the distribution of the fund which should properly belong to the 6,000 Eastern and Emigrant Cherokees by actual count represenleed in cause by ~~us~~ or the appellees.

48. *The Probable number of Eastern Cherokees.*

We are not able to sum up by any census found, or any reliable estimate made, a larger number of Eastern Cherokees who would be entitled to their pro rata of this fund than 22,500 at the most, including our own representation.

49.

There are two points that should be approximately if not definitely settled by the court, viz.:

1. The probable number of persons entitled to participate in the fund?

2. The degree of consanguinity necessary for enrollment?

3. Whether the money shall be paid to individuals or to families? It would be a difficult thing to attempt to pay a large number of minor children.

50. *Prayer.*

Your complainants, therefore, request upon the facts shown, as follows: That if the court should determine that the Cherokee Nation are, as they claim, the proper custodians of this fund, that then the proportionate share of the Eastern and Emigrant Cherokees to the fund be set aside for them, independently to be distributed by the Secretary of the Interior, in accordance with their numbers.

But if your Honors shall decide, as we expect you will, that the principal part of the fund known as Item No. 2, belongs to the Eastern Cherokees, and the Eastern and Emigrant Cherokees, then we ask and expect that one-fourth part, in proportion to our numbers, or $277,821.18 1-2 of the whole sum, with interest thereon from June 12, 1838, be set apart for the Eastern and Emigrant Cherokees, as their distributive share. . .

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